Supreme Court of the United States.

OCTOBER TERM, 1879.

No. 109.

FRANK F. CASE, RECEIVER OF THE CRESCENT CITY NATIONAL BANK, *Plaintiff in Error,*

VS.

CITIZENS' BANK OF LOUISIANA, *Defendant in Error.*

In Error to the Circuit Court of the United States for the District of Louisiana.

J. D. ROUSE,
WM. GRANT,
For Plaintiffs in Error.

Clark & Hofeline, Brief Printers, 112 Gravier Street.

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In Error to the Circuit Court of the United States for the District of Louisiana.

STATEMENT OF THE CASE.

This is an action brought by the Citizens' Bank of Louisiana against the Receiver of the Crescent City National Bank, to recover damages for an alleged refusal on the part of the officers of the latter bank to permit a transfer of two hundred and twenty shares of its capital stock.

The petition in substance alleges that the shares were pledged to the Citizens' Bank by Lizardi & Co., to secure the payment of their note for $20,000; that the act of pledge contained an authority to the Citizens' Bank to sell and transfer the stock for the pur-

pose of paying said note; that said stock was sold under the act of pledge for $40 per share, but that the Crescent City National Bank refused to permit the transfer thereof on the books, alleging the indebtedness of Lizardi & Co. to it, as an excuse for such refusal; that by such refusal the sale of said stock was prevented, and that before legal steps could be taken to enforce the right of transfer, the Crescent City National Bank failed, causing a loss to the Citizens' Bank of $8,800.

The prayer is that the Receiver be ordered to recognize the Citizens' Bank, as a creditor for said sum, and that he place it on the next *tableaux of distribution* for its share of the amount already divided among creditors, and in all future dividends to be distributed. Record, p. 1.

This petition was filed February 24th, 1876.

On the 15th of March, 1876, the Receiver filed an exception setting up two grounds of defense: 1°. That the cause of action did not accrue within one year next before the commencement of the action, as appears from the petition filed. 2°. That the petition did not disclose a cause of action. Record, p. 4.

This exception was overruled on argument.

On the 15th of November, the Receiver filed an answer reserving the benefit of said exceptions and renewing the same, and denying all the allegations of

the petition, except his appointment as Receiver. Record, p. 5.

At the trial of the case the evidence showed in substance :

1°. That the Citizens' Bank held the notes of Lizardi & Co. for the face amount of $20,000, secured by an act of pledge of two-hundred and twenty shares of the capital stock of the Crescent City National Bank, and that the act of pledge authorized the cashier of the Citizens' Bank to transfer the shares. No evidence, beyond the notes themselves, was offered to establish the existence of the debt of Lizardi & Co. Nor was any evidence offered showing that the Citizens' Bank had made any effort to collect the debt of Lizardi & Co., or that they were insolvent.

2°. That the Citizens' Bank applied to the cashier of the Crescent City National Bank during banking hours for him to transfer said stock about, the 1st of March, 1873; that the cashier refused to allow the transfer, but no express authority from the bank to refuse the transfer, was shown, beyond the fact that he was the officer to whom the bank had by custom, entrusted the matter of making transfers of stock.

3°. The refusal to transfer took place March 1st, 1873, and no evidence was offered showing an interrup-

tion of the course of prescription which then began to run against the cause of action growing out of such refusal.

On these facts the Court was requested on behalf of the Receiver of the Crescent City National Bank, to instruct the jury:

1°. That the bank was not liable for the refusal of the cashier to make the transfer, unless it appeared that he was acting through some general or special authority of the charter or by-laws of the bank, or some authority derived from the corporation through its directors. But the Court refused to give this instruction, and instructed the jury that if the directory of the bank had by custom entrusted the matter of making the transfers to the cashier, his refusal was the refusal of the bank.

2°. That the action is one arising ex delicto, and is prescribed by one year, and that unless an interruption has been shown by evidence, the verdict must be for defendant on the plea of prescription. But the Court refused to so instruct, and charged the jury that this plea had been overruled by Judge Woods, and that he agreed with Woods, that this action arose ex contractu.

3°. That the plaintiff had no right of action as pledgee, to recover the damages claimed, but that such right, if any existed, was vested in Lizardi & Co., the owners. This the Court refused, but instructed the

jury that possession of the certificate with the power to transfer, gave the right of action.

4°. That unless plaintiff has shown Lizardi & Co. to be insolvent, or that diligent and unavailing effort has been made to collect the debt, it can only collect nominal damages. This the Court refused.

Exception to these rulings of the Court were duly taken, allowed and certified. R. p. 7.

The verdict of the jury was in favor of the plaintiff below for $4000, with five per cent, interest from March 6, 1873, and the Court thereupon rendered judgment "that the Citizens' Bank of Louisiana do have " and recover of the Crescent City National Bank, " Frank F. Case, Receiver, four thousand dollars. and " interest, etc., * * * and that Frank " F. Case, Receiver, do recognize the aid Citizens' " sBank of Louisiana as creditor * * * and " that he do pay the same, or certify the same to the " Comptroller to be paid in due course of adminis-tra- " tion * * and that the Citizens' Bank of Loui- " siana do receive before further payment to creditors, " its due proportion of dividends pro rata with those " already paid to the creditors of the Crescent City " National Bank." Record, p. 9.

ASSIGNMENT OF ERRORS.

1°. The Court erred in overruling the exception of

the prescription of one year, and no cause of action, filed by defendants below.

2°. The Court erred in instructing the jury that the defendant below was liable for the refusal of its cashier to permit a transfer of the 220 shares of stock.

3°. The Court erred in instructing the jury that the action of plaintiff arose ex contractu, and was not prescribed by one year.

4°. The Court erred in refusing to instruct the jury as prayed by the defendant, that the plaintiff below had no right of action as pledgee, to recover damages for the refusal to transfer said stock.

5°. The Court erred in refusing to instruct the jury as prayed by defendant, that unless Lizardi & Co. were shown to be insolvent, or unless an unavailing effort had been made to collect its debt of them, the plaintiff below could collect only nominal damages.

6°. The Court erred in ordering Frank F. Case as Receiver of the Crescent City National Bank, to pay the amount of the judgment, or to certify the same to the comptroller.

ARGUMENT.

We propose to consider these errors in the order assigned, discussing, however, number 1 and 3, together as one question.

I.

The action of the Citizens Bank of Louisiana arose clearly ex delicto, and not ex contractu, and was, therefore, prescribed by one year under the Louisiana statute.

The act charged was a misfeasance, and it is classed by the Civil Code of Louisiana as a quasi offense. See Civil Code, Art. 2315, et seq.

"Every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill." Civil Code, Art. 2316.

Civil Code, Art. 3536: "The following actions are prescribed by one year:

"That for injurious words, whether verbal or written, " and that for damages caused by animals, *or resulting* " *from offenses or quasi offenses.*"

It has been held under these articles of the Code, that an action against a notary to recover damages for neglect to give notice to the endorser of a note placed in his hands for protest, is prescribed by one year.

Taylor & Reddin vs. James Graham, 15 La. An. 418.

A claim against a sheriff for neglect and malfeasance is also prescribed by one year.

Semple vs. Buhler, 6 Martin La. R. (N. S), 669.

In this case the malfeasance charged, consisted in the

taking by the sheriff of the wife of the debtor in execution, as surety on a twelve months' bond.

An illegal seizure of another's property by a sheriff is also held to be a quasi offense. The action for damages in such case is for the "faulty or tortious act" of the defendant.

Anty vs. Adee, 9 La. Ann. 490.

An action to recover damages for the value of property converted to the defendant's use, is one of tort, and is prescribed by one year

Harper vs. Municipality No. 1, 12 A. 346.

An action for trespass on land and cutting wood, is also founded in tort, and is prescribed by one year.

Foley vs. Bush, 13 A. 126.

So it has been held in numerous cases, that the action for damages for the wrongful taking and conversion of personal property is prescribed by one year.

Williams vs. Greiner, 20 Ann. 151.

Wood vs. Harispe, 26 Ann. 511.

Burch vs. Willis, 21 Ann. 492.

In his commentaries on Article 1382 of the Code Napoleon (La. Code, Article 2315, O. C., 2294), Marcadé developes the distinction between damages ex delicto and damages ex contractu, with admirable clearness. The former flow from the *violation of a duty*, the latter from a breach of a *special obligation*.

5 Marcadé, p. 267, Sec. 3.

The quasi offense of the civil law would seem to be the same as tort at common law, which 1 Hilliard on Torts, p. 1, describes as a wrong, independent of contract.

The action at common law would be on the case, to recover damages for a tort. 1 Chitty Pleadings, 132, 133.

This suit is for the value of the stock at the date of the refusal to transfer, as in case of a conversion of personal property. Under the authority of the cases cited, the action for damages for conversion of property, as well as for a violation of some duty imposed upon a person by law, is clearly prescribed by one year.

The petition on which judgment was rendered avers a violation of a duty imposed upon the officers of the bank by its charter, and the Acts of Congress, and in effect prays for a judgment for the value of the stock, as in case of the conversion of property. No contract is set up as the basis of the action.

But it is assumed that the bank and its officers were the agents of the stockholders holding a mandate, in law, from them to administer the affairs of the corporation. On this theory, the Judge held that the action arose ex contractu.

This position is not supported by any sound authority. A corporation can only act through its agents, and these are its officers in whom the charter has vested the ad-

ministration. The mandate is from the corporation as such, and not from the stockholders, though they elect the officers. Angel & Ames, Corp., Ch. 10, Sec. 2.

If the cashier, as was held by the Court below, was the agent of the stockholder, then the bank cannot be charged with the consequences of his illegal act. On the other hand, it is absolutely necessary that the Court should hold that he was the agent of the bank, in order to support the right of action

But suppose the cashier may be considered the agent of both, he, and not the corporation, should he held liable to the stockholder whose rights are violated; for it would be absurd to cast one principal in damages for the agent's wrongful act towards the other.

It seems clear to us that this suit is based upon a breach of duty by the agent of a corporation, resulting in damage to a stranger—for the plaintiff was not a stockholder, but a pledgee of stock; and that the action to recover these damages arises ex delicto, and is prescribed by one year.

II.

The Court erred in instructing the jury that the Bank was liable in damages for the refusal of the cashier to permit the transfer.

The by-laws of the Crescent City National Bank as set forth in the Bill of Exceptions, do not authorize

the act complained of, nor is it alleged or shown that the directors authorized it by resolution or otherwise.

The only evidence on this point is that the cashier, who had charge of the transfer by custom, refused to permit the transfer on account of Lizardi & Co.'s indebtedness. But it does not appear that he was entrusted with the authority he pretended to exercise, by this custom.

In the case of Bank vs. Lanier, 11 W. 369, the refusal to transfer was authorized by a by-law of the Bank; so also in Bullar vs. Bank, 18 W. 589. In both of these cases the corporation justified and defended the act of its officers.

The general rule at common law on this point is admirably stated in Angel & Ames, on Corp. Ch. 9, Sec. 10, 3rd Ed. p. 303.

"A corporation is not, however, responsible for unau-
" thorized or unlawful acts of its officers, though done
" *colore officii*. To fix the liability it must either appear
" that the officers were expressly authorized to do the
" act, or that it was done bona fide in pursuance of a
" general authority in relation to the subject of it, or
" that the act was ratified or adopted by the corpora-
" tion."

See Thayer vs. Boston, 19 Pick. 516.

The pleadings do not aver, nor does the evidence *show*, facts sufficient to bring the case of the plaintiff below, within these requirements.

But the rule of liability in Louisiana is still further restricted by the Civil Code, Art. 2320, (2299). "Mas- " ters and employers are answerable for the damage oc- " casioned by their servants. * * * In the above " case responsibility only attaches when the employer " might have prevented it, and did not."

This article of the code is so fully and philosophically treated in Ware vs. Barataria, 15 La. R. p. 169, and the cases cited as to need no comment by us.

It was absolutely necessary for the plaintiff below to allege and show that the corporation could have prevented the wrong and did not. Not only should the exception of no cause of action have been sustained as to the petition for want of allegation of this fact, but the court clearly went too far in charging the jury that the defendant below was liable without qualification, for the illegal act of its agent.

In Strawbridge vs. Turner, 8 La. R. 5 37, the Court remanded the cause, with directions to instruct the jury "that no responsibility attaches to the defendants " unless they might have prevented the act which oc- " casioned the damages claimed, and have not done it."

Before the Bank could have been held for the wrongful act of its officer, it should have been notified of his refusal, in some manner, so that the directors might have an opportunity to prevent the injury.

III.

The fourth and fifth assignments of error may be considered as one question.

If the defendant below was liable at all to the pledgee it should not be mulcted beyond the amount of damages actually suffered as a consequence of the wrongful act.

The petition merely alleges the refusal to transfer, and the subsequent failure of the Crescent City Bank as the cause of action. *No damage is alleged*, and the proof at the trial did not show the loss of any part of the debt as a consequence of the refusal to transfer these shares of stock. In the absence of any proof to the contrary, Lizardi & Co. are presumed to be solvent. Clearly the Court should have charged the jury that the plaintiff below could only recover of the defendant the actual loss sustained, and not the value of the stock as in case of full ownership. The debtor is solvent, what damage can the pledgee suffer? It cannot be pretended that a pledgee has a right of action beyond or independent of the special damage he may show he has suffered, for his right of recovery springs, not from the bare act of pledge, but from the fact of damage to his right as a creditor.

Title to property is sufficient in itself to support the owner's right of action to recover its value in case of conversion; but the bare act of pledge does not give this right. In other words, the owner has a general right

to damages to the full value of the property; but the pledgee has only a special right to the extent of the actual damage to his interest in the property as a creditor. If Lizardi & Co. were solvent, the entire destruction of the thing pledged could not injure the pledgee.

Neither the averments of the petition, or the proof, make out a case for the plaintiff below; and the ruling of the court on the exception, and the refusal to instruct the jury as asked on in this point, are erroneous.

IV.

The judgment is clearly irregular and should be set aside for reasons apparent on the face of the record.

The petition closed with a prayer that Frank F. Case, the Receiver of the Crescent City National Bank, be ordered to recognize the plaintiff below as a creditor for $8,800, and to place it on his tableaux of distribution, 1°, for the amount of dividends already paid, and 2°, for all future dividends.

The judgment decrees in substance, as prayed in the petition.

The Court thus attempted in a decree against the Receiver, to usurp the authority conferred on the Comptroller of the Currency by the National Bank Act.

The authority to allow claims against insolvent National Banks in liquidation and make dividends, is committed to the Comptroller of the Treasury by Sec. 5236, U. S. R. S.

The Receiver can only collect the assets and remit the funds collected to the Comptroller as defined in Sec. 5235, R. S.

The Receiver merely represents the bank, and has no more authority to declare or regulate dividends than the bank itself has. He is wholly without the power or authority to do what the decree requires of him; and the Court exceeded its jurisdiction in imposing on him a duty expressly confided by statute to the Comptroller.

Unless the decree is reversed, the Receiver will be held for contempt of Court, or he will be proceeded against by the creditor for damages, if he fails to do an impossible thing.

For these reasons we respectfully submit that a venire de novo should be granted.

J. D. ROUSE,
WM. GRANT,
For Plaintiffs in Error.

No. ~~7765~~. 803 Oct T. 1878

In the Supreme Court

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VS.

THE CITIZENS' BANK OF LOUISIANA,

DEFENDANT IN ERROR.

Brief for Defendant in Error.

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VS.

THE CITIZENS' BANK OF LOUISIANA,

DEFENDANT IN ERROR.

Brief for Defendant in Error.

Bill of Exceptions filed by Plaintiff in Error.

Plaintiff in error asked the Court to instruct the jury as follows :

1st. That the Defendant is not liable for the refusal of the cashier or other officers to transfer stock, unless he acted in the premises under the authority of the charter, or by-laws of the Bank, or pursuant to some general or special authority in the premises, derived from the corporation through its

Board of Directors. The Court refused to instruct the jury as prayed for, and instructed them as follows :

" If you find that a person representing the Plaintiff, having in his possession the certificates of shares, went to the Crescent City National Bank during the ordinary hours of business, and there found the cashier of the Bank, *and that he was the officer to whom the Directory of the Bank had, by custom, entrusted the matter of making* the transfer, at the same time offering to deliver up the old certificates, and that the cashier refused to allow the transfer upon the ground of Lizardi's indebtedness to the Crescent City Bank, then I instruct you that such refusal was the refusal of the Bank."

The charge of the judge is a complete refutation of the exception filed by the receiver. It requires the jury to find that the cashier was the officer specially instructed by the Directory with the transfer of shares, which is the requisite insisted upon by the Defendant, and the jury having found that such was the fact, did consider his refusal the refusal of the Bank.

Besides the special finding of the jury in this case, the constant jurisprudence of the United States and of the State of Louisiana in matters of Banks, and of the duties and powers of Bank cashiers, would be sufficient to support the ruling of the Court and the decision of the jury.

We beg leave to refer the Court to the following authorities. *Ware vs. Barataria Co.*, 15 *La., Rep.* p. 170. " There is no distinction as to the liabity of " corporations and natural persons for the acts and " neglect of their agents, when acting within the " scope of their employment.

Etting vs. Commercial Bank, 7 Rob. Rep. p. 459. " When an agent, acting in the capacity conferred by " a corporation, under the direction of his employers, " or in the discharge of some duty incidental to his " situation, does any act causing damage, the cor- " poration will be responsible. *Reed vs. Powell*, 11 " *Rob. Rep. p.* 98.

" The powers and duties of Bank officers being " defined by its charter and by-laws, they will, " when acting within their sphere, represent the " corporation and bind it by their acts."

Pontchartrain R. R. Co. vs. Heirn. 2 *An. Rep. p.* " 129. When the business of a company is such as " to require it to be conducted through agents, " notice to one, in a matter in which he acted within " the scope of the company's business, will bind the " company."

These authorities in Louisiana simply affirm the principles established by the whole jurisprudence of the United States, as acknowledged by the best writers on corporations.

Angell and Ames. Abbott, Morse, et al.

2nd. As to the SECOND EXCEPTION by the Plaintiff in error, viz: That the action is one arising *ex delicto* and is prescribed by one year, and unless an interruption of prescription has been shown by evidence, there must be a verdict for the Defendant.

In reply to this exception we, for Defendants in error, invite the attention of this Honorable Court to the fact (which appears by the statement in said second exception) that the Judge charged the jury that this plea of prescription had been over-ruled by Judge Woods and that this Court concurred with Judge Woods that this action arose *ex contractu*.

In support of this charge we beg leave to offer the following:

On the argument in the Circuit Court, Plaintiffs in error cited Louisiana Revised Code, Article 2316 (old Code 2295) and 3536 (old Code 3501), to show that the action is prescribed by one year.

It is easy to read a single Article of our Code and leap to a conclusion, which will be erroneous in its application to the case under consideration.

It is safer and sounder to examine the construction put on the law by the Supreme Court of the State.

Thus, the prescription of one year pleaded in this case is applied to Article 2315, which is found under the head "Of offences and quasi offences", Chapter 2, Title V, of the Code.

Now, it is obvious that, if this case does not come

under the head "of offences and quasi offences" this prescription of one year will not apply.

By way of illustration of the necessity of looking to the decisions, a note is prescribed in five years, and it would be very easy for a defendant to plead that, under Article 3540 of our Revised Civil Code, it is prescribed, because five years had elapsed, reckoning from the day when the engagements were payable.

But it would be competent for the Plaintiff to reply that, under the construction placed upon this Article by the highest State judicial authority in Louisiana, prescription is suspended so long as the holder of that note is in possession of collaterals pledged by the maker to secure its payment. Blanc vs. Herzog, 23 Ann., 199.

Stocks pledged as a security for a loan constitute a standing acknowledgment of the debt, and prescription is interrupted during the time of the pledge.

Police Jury vs. Duralde, 22 Ann., 167, and authorities there cited. Citizens' Bank vs. Knapp, ib. 117.

Now, coming back to the prescription of one year, it *here* applies only to cases arising from damage caused by the commission of an offence or quasi offence.

Rev. C. C., 3536, Campbell vs. Miltenberger, 26 Ann., 72.

Quasi offences, Rev. C. C., 2315, (old Code, 2294.) Every act of man &c.

In general, all personal actions, except those before enumerated, are prescribed by ten years.

Rev. C. C., 3544, (3508.)

EXAMPLES OF OFFENCES AND QUASI OFFENCES.

1st. Trespass in cutting wood of another's land, and this is prescribed by one year.

Whitehead vs. Dugan, 25 Ann., 411.

2nd. Seizure of A's property, in execution of a judgment against B, is a quasi offence and is prescribed by one year.

Lizardi vs. N. O. B. Co., 25 Ann., 414.

3rd. Collision.

4th. Damage by R. R. Co., or destruction or injury to human beings, mules, horses or other stock by engines.

5th. Damage by fall of a building negligently left unrepaired or unsupported.

The foregoing are prescribed by one year.

EXAMPLES OF CASES WHICH ARE NOT OFFENCES OR QUASI OFFENCES.

1st. Action against a *negotiorum gestor*.

This is prescribed by ten years.

Rev. C. C. 3544. Devot & Co. vs. Marx, 19 Ann., 491.

2nd. The agent's obligation to his principal is a personal one and is prescribed by ten years.

Eichelberger vs. Pike, 22 Ann., 143, in which case our Supreme Court held that the right to recover of a banker, for failing to protest a note, whereby an endorser is discharged, is prescribed by ten years.

3rd. Action against Telegraph Company, for loss on goods by error in message, or failure to transmit message, is prescribed by ten years.

Lagrange vs. S. W. T. Co., 25 Ann. 383.

4th. In Percy and others vs. White and others, 7 Rob. (La.,) 513, it was held that "an action by the stockholders against the directors of a bank for damages for losses sustained through their negligence, fraud or mismanagement, is prescribed by ten years from the date of the acts complained of."

In that case the Court said: "It is to be observed that, as to the parties sued as directors, this is essentially an action for damages against certain directors for negligence, fraud and mismanagement, as the agents of the Bank and of the Plaintiffs as stockholders. They are charged as wrong-doers and unfaithful agents, and the damages are asked for, as an indemnity to those who have been injured."

As Lizardi & Co., were script or stockholders in the Crescent City National Bank, that Bank (as a

corporation) was the agent of Lizardi & Co., and of their transferees, the Citizens' Bank of La., for the purpose of the transfer of the shares from Lizardi & Co., to the Citizens' Bank.

The National Banks are bodies corporate. United States Rev. Statutes, § 645.

The legal relationship of principal and agent is to be found with precisely the same legal attributes beneath the corporate impersonality and the official dignity. Morse on Banks, 64 and 65.

Whenever an agent violates his duties or obligations to his principal, by positive misconduct or by negligence or omission or in any other manner, and any loss thereby falls on his principal, the agent is responsible therefore and bound to make full indemnity.

Story on Agency, § 217. C.

The Citizens' Bank sues for indemnity for the loss sustained by the refusal of the Crescent City National Bank to transfer the shares.

This action is barred by ten years and not by one year.

On the argument in the Circuit Court, Plaintiff in error cited Taylor et al. vs. Graham, 15 A., 418. But that was an action against a notary *by reason of his negligence in omitting to give notice of protest* to an endorser.

The Court considered it a *quasi offence* and applied the prescription of one year.

This is a *personal* tort of the notary. It is not the same as an *error of law* in an act of his. He had, in this case a special duty to perform, he neglected it, it was a *quasi* offence on his part.

In the case at bar the purchaser of the stock demanded a transfer; the cashier answered that by order of the board he could not allow the transfer, because Lizardi was indebted to the Bank.

For the purpose of transfer the board constitutes the corporations. Morse on Bk., 90.

The cashier assumed no responsibility. He acted by order of the board who had directed him not to transfer any stock the owner whereof was indebted to the Bank.

There was no offence nor *quasi offence* on his part.

The Board had adopted a rule which they believed, at the time, the law authorized them to adopt. It was an error of judgment and not offence or *quasi offence.*

It was a measure to which all owners of stock or purchasers thereof were parties, and from the decisions of Percy vs. White, 7 R. 513 and 510, and Percy vs. Millaudon, 3rd La., 591 et seq., the jurisprudence is clearly settled that the acts of the Directors as agents of the stockholders (and consequently of purchasers of stock assuming thereby the responsibilities of stockholders) are not relieved by the prescription of one year; but submitted to the prescription of ten years.

In the suit of Burch vs. Willis, 21 A., 592, the claim is to recover the value of 50 bales of cotton (not as the result of a sale or contract of any kind) but simply on the allegation: that the Defendant took possession of said cotton and appropriated it to his own use and benefit, *without any right, title or legal claim whatever.*

It is almost an allegation of theft. It was the act of a party with whom the Plaintiff had no connexion whatever, and therefore it was clearly a personal offense on the part of the Defendant.

The difference with the facts of the case at bar is self evident. There was no personality in the act of the cashier who was the ministerial officer of the Bank; and no personality in the directors individually when they acted as a board.

In the Circuit Court, Plaintiff in error contended that the action was barred by one year, because there was no privity, but admitted that where there is privity the action is not barred by one year. Now Banks are trustee for each owner of their stock. Bayard vs. F. M. Bank, 52 Pa. 232, Morse on Banks, 97.

There is privity between Trustee and *cestui que* trust, *ergo* our action is not barred by one year.

3rd. The 3rd exception by Plaintiff in error is: That in order to enable the Plaintiff to recover, the

jury must be satisfied from the evidence that the debt of de Lizardi & Co. to the Plaintiff is still due and unpaid, and if this has not been established the jury must find for the Defendant, which instruction the Court gave with the remark that the only evidence on that point was the production of the note itself.

Defendants in error could easily cite authorities to show that this 3rd exception should be over-ruled, but do not deem themselves justified in occupying the time and attention of this Honorable Court thereupon, as this is not an appeal but a writ of error and the jury have solved the question by their verdict, showing that the jury were satisfied from evidence that the debt was still due.

4th. The 4th exception is that the Plaintiff having alleged that it had only a privilege on the stock of the Defendant as pledgee, no right of action accrued to the Plaintiff for the refusal of the Defendant's officer to transfer the same, but such right of action, if any accrued to De Lizardi & Co., the owners thereof.

To this 4th exception, the reply that our petition shows that we never alleged that *we had only* a privilege on the stock, but our allegation is that the payment of the note was secured by pledge. Now a

pledge is a privilege, and some thing more, the pledge giving the creditor a right to have the thing pledged to be sold for the payment of the debt. Louisiana Revised Civil Code, Article 3220, (old Article 3187.) James vs. Pike, Lapeyre and Brother, 23 Louisiana Annual, 479. Privilege is only a right of a creditor to be preferred before other creditors. La. Rev. C. C. 3186, (old Art. 3153.) By Article 123 of the Louisiana Constitution, and subsequent legislation, no privilege shall affect third parties unless recorded. Our Supreme Court has decided that the right of *pledges* of a lessor need not be recorded. Arick vs. Walsh and Borsseau *et al.* 23 L. Annual, 605. Burnett vs. Cleneay, 24 Louisiana Annual, 143.

Indeed, our petition shows that we had alleged that petitioners, *in the exercise of their legal right under the pledge*, offered in the market all the stock pledged as aforesaid.

Thus we asserted, (not as the 4th exception states,) that we had only a privilege, but that we had a pledge and a right to sell the stock.

And we have above shown that the Law gave us that right.

Before we leave these references to our petition, it may be proper to state that, by a clerical error, we claimed therein $8,800, while in fact we claimed only $4,000, that is 100 shares at $40 per share, (the

price we would have obtained if the Crescent City National Bank had not illegally prevented the transfer of the stock) with interest at five per cent from the 6th day of March, 1873, which is the date of the Bank's refusal to transfer.

And such are the verdict and judgement. The Act of pledge pledges the stock and authorizes its transfer upon the looks of the Bank.

5th. The 5th and last exception is, that unless the Plaintiff has shown by evidence that de Lizardi and Co. are insolvent, or that the Plaintiff had made diligent and unavailing efforts to collect its debt, it can recover only nominal damages.

To this exception, and in part, to some of the previous exceptions, we reply in the language of the Court, as shown by this 5th exception, "that the possession of the certificates of stock, with power of attorney to transfer the same, gave the Plaintiffs a right of action for the refusal of the transfer."

Having thus replied to the exceptions of Plaintiff in error, we beg leave to conclude this Brief by answering the pretension of the Crescent City National Bank, as set up in their answer to our cashier, that Lizardi and Co's indebtedness to it justified its refusal to transfer the stock pledged to the Citizens' Bank.

By Section 5135, Revised Statutes of United States, page 999, paragraph 6,

Defendants had power to prescribe by its Board of Directors by-laws *not inconsistent with law* regulating the *manner* in which its stock shall be transferred.

The authority to regulate *the manner of transferring* the stock does not embrace the power to create a lien upon it. The sole object of Section 5135 was that the corporation should know who were its stockholders entitled to dividends, and to vote and hold office and contribute to losses. Manner *means* form or *method.*

It does not mean the terms or conditions. For illustration of *manner*, see Abbott on Corp., p. 756, No. 196, and p. 138, No. 22.

By Section 5139 Revised Statutes, p. 999, the Capital Stock shall be transferable on the books of the Association *in such manner* as may be prescribed in the By-Laws or Articles of Association, and Tranferees " succeed to all the rights and liabilities " of the prior holders and no change shall be made " in the Articles of Association by which the rights " of existing creditors shall be impaired."

Now, as the law gave power to the Banks only to regulate the *manner* of transfers, they have not power to provide that no transfer should be made if the transferrer was indebted to the Bank.

Inclusio unius est exclusio alterius. City of New

Orleans, vs. Philippi, 9 Ann. 46, and authorities therein cited.

There is no lien at common law upon stock, for debts in favor of the corporation issuing the stock.

Abbott on corporations, page 757, No. 206.

When such a lien exists it is by statutory authorities either expressed in the Act of Incorporation or By-Laws made by authority of the Act. *Ibid ib.*

A corporation has no implied lien on the stock of a share holder which has been transferred by him as security, and the Company is bound, notwithstanding they have such a demand, to enter in their books the transfer of the stock and is liable in damages for refusal.

Abbott, p. 757, No. 207 and note X.

Same Point Abbott, p. 756, No. 196.

By Section 5201, page 1012, Revised Statutes.

No Association shall make any loan or discount on the security or discount of the shares of its own capital stock, unless, &c. Loans by National Banks to their stockholders do not give a lien to the Bank on the stock of such stockholders.

Bank, vs. Lanier. 11 Wallace, 369.

So, the Supreme Court of Louisiana said in the year 1870.

"In effect, the Bank assumes that it can ordain "by law to remove property from commerce. The "argument is a glaring absurdity. The Act of 1855,

" authorizing free Banks, declares that the share " shall be personal property, and be transferable on " the books of the corporations, in such manner as " the By-Laws may direct."

Act 1855, Section 8. Authority to direct the MANNER OF THE TRANSFER of Bank stock on its books, certainly does not authorize the Banks *to* PROHIBIT the transfer.

We know of no mode by which a creditor can secure his debt in the manner contended for by the Bank.

We know of no law authorizing a creditor to place the property of his debtor out of commerce on account of the debt. Bryon vs. Carter, 22 A., 100.

By-Laws must not be opposed to, or inconsistent with, the Statute or common law of the realm nor contradictory to the Charter of Incorporation. (See the authority quoted at p. 12, Green's Brices Ultra Vires.)

By-Laws must not be repugnant to the Constitution or laws of the United States or of the State creating the Corporation, or of the State wherein it seeks to exercise its powers, nor repugnant to its Charter, or in excess of the powers as to making By-Laws granted to it.

W. S. vs. Hart, 1 Pet. C. C., 390.

Bank vs. Lanier, 11 Wall., 369, and other authorities cited in Green's Brices Ultra Vires, p. 13, note X.

A National Bank, though having power to regulate the transfer of its stock cannot create a lien by a By-Law on such stock.

Bullaro vs. Bank, 18 Wall., 594.

Bank vs. Lanier, 11 Wall., 369.

For these reasons we respectfully ask that the judgment of the Circuit Court be affirmed.

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